No. 22-153

IN THE

United States Court of Appeals for the Federal Circuit

IN RE MONOLITHIC POWER SYSTEMS, INC.,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas (Albright, J.)

RESPONSE TO PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTEREST

Counsel for Bel Power Solutions Inc. certify under Federal Circuit Rule 47.4 that the following information is accurate and complete to the best of their knowledge:

1. **Represented Entities**. Provide the full names of all entities represented by undersigned counsel in this case.

Bel Power Solutions Inc.

2. **Real Parties in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. **Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

Bel Fuse Inc.

4. **Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

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GILLAM & SMITH LLP: Melissa R. Smith, James T. Underwood

5. **Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case.

None.

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

Not applicable.

Dated: January 20, 2023

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INTRODUCTION

This case arises on a writ of mandamus. The petitioner, Monolithic Power Systems, Inc. (MPS), therefore bore the heavy burden of demonstrating that the district court's order amounted to a usurpation of judicial authority and that MPS has no other adequate remedy at law. MPS failed to make this showing before the original panel, and it does not attempt to do so in its petition for rehearing en banc.

Instead, MPS and its *amici* twist the panel's decision into something it is not, arguing that the panel made some new proclamation on venue. MPS also suggests that mandamus may issue without a showing that the district court's decision amounted to usurpation of judicial authority. Neither contention is correct.

First, the panel made no new law when it denied MPS's petition for a writ of mandamus. It simply concluded that MPS had "not shown a clear and indisputable right to mandamus relief in its improper venue challenge" based on the "idiosyncratic" facts presented. ADD5, ADD7.* As a result, the panel emphasized that it "did not reach the merits" of MPS's venue challenge. ADD7. Nothing in this fact-specific conclusion warrants en banc review.

* Citations to "ADD" refer to the addendum to MPS's petition for rehearing. Dkt.No.28. Citations to "Appx" refer to the appendix filed with MPS's petition for mandamus. Dkt.No.18.

Second, MPS's petition is premised on a mistaken understanding of the writ of mandamus. Even under the theory of supervisory mandamus MPS espouses, the Supreme Court and this Court have made plain that the writ may not issue in the absence of a clear abuse of discretion or usurpation of judicial authority. Neither occurred here. The panel's decision was grounded in well-settled authority governing patent venue. And MPS cannot demonstrate that this case presents a recurring issue over which there are divergent outcomes requiring clarification by the full Court.

At bottom, MPS's petition amounts to nothing more than a disagreement over the district court's assessment of the facts and the panel's deference to those findings. That is not the stuff of en banc review. MPS's petition should be denied.

BACKGROUND

In June 2021, Bel Power sued MPS in the Western District of Texas (WDTX), asserting claims for direct and indirect infringement of six patents. ADD2. As relevant here, MPS moved to dismiss the case for improper venue, arguing that it does not have a "regular and established place of business" in the WDTX within the meaning of 28 U.S.C. § 1400(b). ADD2.

The district court denied MPS's motion. ADD2. After reviewing the facts in evidence, the court found that MPS had "ratified a regular and

established place of business" in the WDTX through the homes of four employees. ADD2; Appx7. The court emphasized that MPS "specifically solicits employees to work in Austin" and has a "history of Texas-targeted hiring in 2009, 2018, and 2021." Appx5. The court also pointed to evidence that MPS's "employees in this District collectively possess and deliver its products" as part of their jobs. Appx6-7. And there was evidence that MPS specifically intended to use the homes of its employees as field laboratories, providing its employees with specialized testing equipment, to serve some of MPS's most important customers within the District. Appx5-6. According to the court, this evidence "show[ed] that [MPS] believed a location within the [WDTX] to be important to the business performed." Appx5. The court therefore found that venue was proper under § 1400(b). Appx5.

MPS then petitioned this Court for a writ of mandamus, challenging the district court's conclusion. ADD3.

On September 30, 2022, a divided panel of this Court denied MPS's petition. ADD8. The majority explained that the district court had analyzed MPS's physical presence in the WDTX under the appropriate authority—namely, *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017)—and found venue proper "based on the specific circumstances surrounding [MPS's] history of soliciting employees to work in the [WDTX] to support MPS's local OEM

customers in that district and the extent and type of laboratory equipment and product maintained in the homes of those employees." ADD4. The panel emphasized that "the nature of work that employees perform from their homes on behalf of their employers are varied" and this case presented a particularly "idiosyncratic set of facts." ADD6.

The panel stressed it "did not reach the merits" of MPS's venue challenge. ADD7. Instead, it emphasized that it "was not persuaded" that the case implicated a "basic, unsettled, recurring legal issue" warranting mandamus relief. ADD4. Citing circuit precedent, the panel also noted that post-judgment appeal generally provides adequate relief from a district court's refusal to dismiss for improper venue. ADD4. Accordingly, the panel held that MPS had not demonstrated "a clear and indisputable right to mandamus relief." ADD7.

Judge Lourie dissented. He disagreed with the district court's assessment of the facts, ADD10-11, and in his view, mandamus was appropriate simply to "ensure 'proper judicial administration,'" ADD11.

REASONS FOR DENYING THE PETITION

Rehearing en banc "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions or (2) the proceeding involves a question

of exceptional importance." Fed. R. App. P. 35(a). This case meets neither requirement.

In addition, MPS's petition for rehearing is premised on a fundamental misunderstanding of mandamus—one that would dilute the writ to nothing more than a vehicle for error correction. Such an approach is inconsistent with the final-judgment rule and would contradict the limits that the Supreme Court and this Court have placed on mandamus relief. As a result, the Court should deny MPS's petition for rehearing en banc.

I. MPS has not shown any conflict in precedent or exceptional issue worthy of review by the full Court.

The panel made no new law on venue in denying MPS's mandamus petition. It simply concluded that MPS had failed to demonstrate that the district court's decision amounted to a clear abuse of discretion. ADD6-7. There is nothing exceptional about that holding, and it did not depart from any decision of this Court.

MPS does not show otherwise. Instead, it attempts to manufacture an issue warranting en banc review. But, in doing so, it mischaracterizes the panel's decision and misreads into it a standard the panel never adopted.

A. The panel correctly held that MPS failed to demonstrate a "clear and indisputable" right to mandamus relief.

The Supreme Court has carefully limited the availability of a writ of mandamus. In order to obtain that remedy, a petitioner must show: (1) its

entitlement to the writ is clear and indisputable through a showing of "exceptional circumstances amounting to a judicial usurpation of power"; (2) it has no other adequate means to obtain the relief it desires; and (3) it has satisfied the issuing court that the writ is appropriate under the circumstances. *Cheney v. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Id.* at 380 (internal quotation marks omitted).

The panel remained faithful to these strictures when it held that MPS had failed to demonstrate the kind of clear usurpation of judicial power necessary to secure the writ. The panel properly recognized that there was substantial record evidence supporting the district court's conclusion that MPS had "sufficiently ratified" as its own "place of business" the homes of its employees within the WDTX. ADD4.

In particular, the panel emphasized MPS's decisions to: (1) utilize employees within the WDTX because some of its most important customers are located there; (2) store significant amounts of specialized equipment at the homes of these employees in order to serve those customers; and (3) engage in targeted hiring in the district to preserve its physical presence there. ADD5. In light of these facts, the district court plainly did not abuse its discretion. *Cf. In re Cordis*, 769 F.2d 733, 735, 737 (Fed. Cir. 1985) (finding

venue proper in a district where the defendant's employees stored the defendant's "literature, documents and products" in their in-district homes rather than in a separately leased or owned warehouse of the defendant).

Moreover, in denying MPS's petition, the panel (and the district court) applied the appropriate standards on patent venue, invoking the three main decisions in this space: *In re Cordis Corp.*, 769 F.2d. 733 (Fed. Cir. 1985); *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017); and *Celgene Corp. v. Mylan Pharmaceuticals Inc.*, 17 F.4th 1111 (Fed. Cir. 2021). ADD4-5.

It bears repeating that the only thing the panel held was that MPS failed to show a clear entitlement to mandamus. The panel recognized this case presented "idiosyncratic" facts, which made it even more difficult for MPS to show a clear abuse of discretion. ADD5. And the panel declined to reach the ultimate merits of the venue issue, confining its holding to MPS's failure to establish a right to mandamus relief. ADD7. Thus, far from re-envisioning the standards governing venue under § 1400(b), the panel's decision amounts to a straightforward application of the demanding standards for mandamus.

In addition, MPS concedes, as it must, that a challenge to venue may be reviewed after a final judgment. Pet.17. That concession further defeats MPS's entitlement to mandamus relief because, as the Supreme Court has

instructed, "the writ is not to be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). The panel faithfully adhered to this rule—and circuit precedent—recognizing that, "'[o]rdinarily, mandamus relief is not available'" to review interlocutory orders on venue, "because post-judgment appeal is often an adequate alternative means for attaining relief." ADD4 (quoting *In re Volkswagen Grp. of Am., Inc.*, 28 F.4th 1203, 1207 (Fed. Cir. 2022)).

B. Because MPS's quibble is with the district court's fact finding and not the law, MPS cannot show an unsettled or exceptional issue warranting en banc review.

Faced with the narrow limits of the panel's holding, MPS attempts to read into the panel decision a standard it never adopted. According to MPS, the panel "departed from settled precedent and embraced a flawed inquiry into the nature of the work that employees perform from their homes." Pet.2, 11-12. But that mischaracterizes the panel's decision.

In denying MPS's petition, the panel properly focused on the actions of MPS. In particular, the panel noted MPS's "history of soliciting employees to work in the Western District to support [MPS's] local OEM customers in that district." ADD4. Similarly, the panel pointed to MPS's decisions to provide numerous pieces of highly-specialized equipment for "the sole purpose of

allowing [an employee] to conduct testing and validation as part of his job" for MPS's in-district customers. ADD5. This evidence shows MPS ratified its employees' homes as important places of its business in the WDTX.

Ignoring all of this, MPS argues that the panel focused on "individual employees' actions" and "off-the-shelf electronics testing equipment." Pet.11. But that is not a fair reading of the panel's decision. Rather, the panel held there was a plausible basis for the district court to conclude that "'the employees' location' in the district 'was *material* to [MPS],'" supporting MPS's physical presence there. ADD5 (emphasis added). The evidence before the district court established that *MPS* provided its employees with proprietary testing equipment, including samples of microcontrollers and demonstration boards, as well as around 50 "engineering samples," and that *MPS* intended for its employees to deliver and use these samples and equipment to serve customers *in the WDTX*. Appx6. Thus, unlike a true remote-work scenario, in which an employee's physical location is *immaterial* to the employer, the record evidence showed MPS structured its business to use its employees' homes for the specific purpose of serving some of its most important customers in the WDTX. *See* ADD5.

MPS does not seriously dispute these facts, but instead complains about the *weight* the district court applied to certain facts supporting a

finding of venue in the WDTX. Indeed, both MPS and the dissent argue that the district court and the panel majority should have relied on *different* facts in conducting the venue analysis. Pet.11; ADD10. In particular, MPS emphasizes that its employees owned their own homes and that MPS does not list those homes as its place of business. Pet.11.

But this Court has stressed that the determination of whether a particular location qualifies as a "place of the defendant" under § 1400(b) is a fact-intensive inquiry that necessarily takes into account "all relevant factors." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1015 (Fed. Cir. 2018). "In deciding whether a defendant has a regular and established place of business in a district, no precise rule has been laid down," "no one fact is controlling," and "each case depends on its own facts." *Cray*, 871 F.3d at 1362, 1366; *accord Celgene*, 17 F.4th at 1122 (factors identified by this Court as relevant to whether a location is a "place of the defendant" are "non-exhaustive"). Even the dissent agrees that the "specifics . . . of course are what any case rests on." ADD10.

Regardless, en banc intervention should not be used to "simply second-guess the panel on the facts of a particular case." *In re Dillon*, 919 F.2d 688, 700 n.3 (Fed. Cir. 1990) (Newman, J., dissenting). As Judge Lourie has explained, even if reasonable judges have a difference of opinion as to the

outcome of a case, "[a] panel is entitled to err without the full court descending upon it." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 469 F.3d 1039, 1043 (Fed. Cir. 2006) (Lourie, J., concurring in denial of rehearing en banc). Thus, where a panel decision "is not viewed as having changed the law," mere disagreement with the outcome "is not a sufficient reason for en banc review." *Dow Chem. Co. v. Nova Chems. Corp. (Canada)*, 809 F.3d 1223, 1228 (Fed. Cir. 2015) (Moore, J., joined by Newman, O'Malley, and Taranto, JJ., concurring in denial of rehearing en banc). Here, MPS has not shown a clear abuse of discretion in the weight that the district court ascribed to the facts before it, let alone any error justifying en banc review.

II. MPS's petition is premised on a mistaken understanding of the scope of the writ of mandamus.

MPS not only fails to demonstrate its entitlement to rehearing en banc, but its entire petition is premised on a mistaken understanding of mandamus relief. According to MPS, the Court possesses the authority to issue the writ based solely on the nebulous pursuit of "proper judicial administration." Pet.17. But supervisory mandamus does not lie in this circumstance, and accepting MPS's argument would eviscerate the final-judgment rule.

A. MPS has not satisfied the standard for supervisory mandamus.

In tacit acknowledgement that it cannot satisfy the traditional standards for mandamus, MPS invokes "supervisory" mandamus while dedicating just a single paragraph to the standard governing its use. Pet.17. Critically, however, supervisory mandamus still requires the petitioner to show a usurpation of judicial authority or a clear abuse of discretion.

As MPS and the dissent acknowledge, the lead case on supervisory mandamus is *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Pet.17; ADD11. There, the Supreme Court recognized the use of the writ to exercise "supervisory control of the District Courts by the Courts of Appeals" to ensure "proper judicial administration in the federal system." *La Buy*, 352 U.S. at 259-60.

But *La Buy* makes plain that supervisory mandamus operates within the existing framework for mandamus relief. In *La Buy*, the district court had essentially abdicated its duties to a special master to conduct a trial of two antitrust actions, claiming the court's "calendar was congested." *Id.* at 251-54. The Supreme Court held this "was a clear abuse of discretion." *Id.* at 257. And it emphasized supervisory mandamus still requires "exceptional circumstances"—for example, a ruling by a district court "so palpably improper as to place it beyond the scope of the rule invoked." *Id.* at 256.

As a result, the Supreme Court has confined the rationale of *La Buy* to the rare instance in which a district court acted in "willful disobedience of the rules laid down by this Court." *Will v. United States*, 389 U.S. 90, 100 (1967). And the Supreme Court has warned against using *La Buy* in any other way:

> Although in [*La Buy*,] we approved the issuance of the writ upon a mere showing of abuse of discretion, we warned soon thereafter against the dangers of such a practice. "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.'"

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 n.7 (1978) (citation omitted).

Where supervisory mandamus permits a modicum of flexibility, it is in allowing a party to show a "usurpation of power" when the case involves "an issue of first impression." *Schlagenhauf*, 379 U.S. at 111. In *Schlagenhauf*, the issue of first impression was the district court's authority to force a defendant to undergo a mental and physical examination. *Id.* at 111. The Supreme Court directed the issuance of the writ because the petitioner had shown the district court "exceeded [its] power in ordering examinations when the petitioner's mental and physical condition was not 'in controversy' and no 'good cause' was shown"—as required by the rule of civil procedure then in effect. *Id.* at 111. Moreover, *Schlagenhauf* was decided before the

Supreme Court cautioned against diluting the writ. *Cf. Will*, 437 U.S. at 665 n.7.

This Court has wisely recognized supervisory mandamus requires not only an "important issue of first impression," but also a situation in which the district court's resolution of that issue can be characterized as "a clear abuse of discretion or usurpation of judicial authority." *In re Queen's Univ.*, 820 F.3d at 1291 (quoting *Connaught Lab., Inc. v. SmithKline Beecham P.L.C.*, 165 F.3d 1368, 1370 (Fed. Cir. 1999)). And it has correctly placed supervisory mandamus within the existing three-part framework that the Supreme Court laid down in *Cheney*. *Id.*; *accord In re Google LLC*, 949 F.3d 1338, 1341 (Fed. Cir. 2020); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017).

MPS has not shown the kind of usurpation of judicial power or clear abuse of discretion that justifies mandamus. It cites no issue of first impression that the district court got patently wrong. Nor could it. The question of when a location qualifies as a "place of a defendant" has been addressed repeatedly by this Court—in *Cordis*, *Cray*, *Celgene*, and *In re Google LLC*, 949 F.3d 1338 (Fed. Cir. 2020). MPS simply disagrees with the district court's fact finding and its ultimate conclusion. That is not a basis for mandamus. And it is certainly not a basis for rehearing en banc.

MPS also has not raised a recurring issue over which there are divergent outcomes necessitating clarification from this Court. *See Micron*, 875 F.3d at 1095. Aside from this case, MPS points to no other decision by a lower court with which it disagrees.

Moreover, a review of the relevant case law demonstrates that district courts are diligently policing limits on patent venue based on remote work. *Compare, e.g., TrackThings LLC v. NETGEAR, Inc.*, No. 21-cv-5440, 2022 WL 2829906, at *8-9 (S.D.N.Y. July 20, 2022) (presence of one remote intern insufficient to establish venue), and *Niazi v. St. Jude Med. S.C., Inc.*, No. 17-cv-183, 2017 WL 5159784, at *4 (W.D. Wis. Nov. 7, 2017) (no venue where there was no evidence that the defendant "engage[d] in business" within the district), *with RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F.Supp.3d 526, 551-53 (S.D.N.Y. 2018) (venue proper where defendant "solicit[ed] sales people" to live in the district and those employees "possess[ed] [the defendant's] products" for use in their jobs there).

Clearly the sky is not falling. And if that changes, this Court can revisit the issue. Until that time, there is no need for this Court's immediate intervention—let alone the full Court's. *Compare In re Google, LLC*, No. 18-152, 2018 WL 5536478, at *2-3 (Fed. Cir. Oct. 29, 2018) (denying mandamus in a venue challenge to allow the issue to percolate), *with In re Google LLC*,

949 F.3d at 1342-43 (revisiting mandamus after several district courts had addressed the issue and taken conflicting views).

B. MPS's watered-down approach to mandamus would eviscerate the final judgment rule.

Appellate jurisdiction is generally limited to appeals of final judgments. 28 U.S.C. §§ 1291, 1295. "'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" *Will*, 389 U.S. at 98 n.6. The Supreme Court has therefore cautioned against any construction of mandamus that would allow the writ to serve as an end-run around the final-judgment rule—and for good reasons.

First, pretrial motions to dismiss for want of personal jurisdiction, venue, or statutory standing are generally not appealable until the end of a case. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988); *Rux v. Republic of Sudan*, 461 F.3d 461, 474-76 (4th Cir. 2006). But under MPS's logic, a dissatisfied party could seek supervisory mandamus of the denial of any Rule 12 motion, arguing that review is necessary to ensure "proper judicial administration." As the panel properly recognized, such an approach would result in this Court being "regularly drawn" into "fact-laden disputes," ADD6, including disputes about jurisdiction, venue, and even the facial sufficiency of a complaint.

Second, part of Congress's rationale for imposing the final-judgment rule was to promote efficiency for circuit courts, docket control for district courts, and fairness to litigants. *See* 15A Wright & Miller, Federal Practice & Procedure § 3907 (3d ed. 2022). Interlocutory appeals, including petitions for writs of mandamus, are "disruptive, time-consuming, and expensive" for both the parties and the courts. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). In this case alone, MPS has taken the parties on a 9-month detour to this Court. Cheapening the writ will only encourage more detours and delays—increasing expenses for everyone.

Finally, MPS and its *amici* complain that the lack of immediate review will "increas[e] litigation costs and uncertainty, encourag[e] forum shopping, and wast[e] judicial and party resources." Pet.18. But they have not shown that there is a larger problem in need of a solution.

In any event, MPS's criticisms could be lodged against the final-judgment rule more generally. Yet Congress took the opposite view—that routine interlocutory review is more costly and wasteful than the alternative. For that reason, this Court has made clear that "[n]ot all circumstances in which a defendant will be forced to undergo the cost of discovery and trial warrant mandamus," because to "issue a writ solely for those reasons would clearly undermine the rare nature of its form of relief and make a large class

of interlocutory orders routinely reviewable." *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1313 (Fed Cir. 2011); *accord Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977) (claims of "expense and inconvenience, without more, do not justify the issuance of mandamus").

CONCLUSION

The Court should deny the petition for rehearing en banc.

Dated: January 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that this Response to Petition for Rehearing En Banc is in compliance with the type form and volume requirements. Specifically, the Response is proportionately spaced; uses a Roman-style, serif typeface (Georgia) of 14-point; and contains 3,881 words, exclusive of the material not counted under Rule 32(f) of the Federal Rule of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, I electronically filed the foregoing document with the Clerk of this Court using the CM/ECF system.

I further certify that on January 20, 2023, I caused a copy of the foregoing to be served via overnight delivery to the U.S. District Judge:

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